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5 UNITED STATES DISTRICT COURT
6 WESTERN DISTRICT OF WASHINGTON
7 AT SEATTLE

8 KRISTA PEOPLES,

9 Plaintiff,

10 v.

11 UNITED SERVICES AUTOMOBILE
12 ASSOCIATION, *et al.*,

13 Defendants.

14 _____
15 JOEL STEDMAN, *et al.*,

16 Plaintiffs,

17 v.

18 PROGRESSIVE DIRECT INSURANCE
19 COMPANY,

20 Defendant.

NO. C18-1173RSL

NO. C18-1254RSL

ORDER CONSOLIDATING CASES
AND CERTIFYING QUESTION TO
THE WASHINGTON SUPREME
COURT

21 These matters came separately before the Court on the defendant insurance companies'
22 motions for judgment on the pleadings. Defendants seek, among other things, dismissal of the
23 Washington Consumer Protection Act ("CPA") claims asserted against them on the ground that
24 plaintiffs have not alleged an injury to business or property. Dkt. # 12 at 11-13 in C18-1173RSL;
25 Dkt. # 19 at 6-8 in C18-1254RSL. The Court finds that the viability of plaintiffs' CPA claims
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27 ORDER CONSOLIDATING CASES AND
28 CERTIFYING QUESTION TO THE
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1 can and should be tested together. It appears that consolidation solely for the purpose of
2 certifying this issue to the Washington Supreme Court will improve the efficient resolution of
3 the cases.¹

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5 Plaintiffs in the above-captioned actions allege that the defendant insurers engaged in per
6 se unfair acts in the business of insurance when they curtailed plaintiffs' benefits under the
7 Personal Injury Protection ("PIP") provisions of their automobile policies. Ms. Peoples alleges
8 that United Services Automobile Association ("USAA") refused to pay medical provider bills
9 whenever a computerized review process indicated that the bill ran afoul of a pre-determined
10 screen or limit. She alleges that the failure to investigate or otherwise make an individualized
11 determination regarding the reasonableness or necessity of the provider's charges before denying
12 payment violates Washington's insurance regulations. See Folweiler Chiropractic, PS v. Am.
13 Family Ins. Co., 5 Wn. App.2d 1002, 2018 WL 4087573, * 3-4 (Aug. 27, 2018). Mr. Stedman
14 alleges that Progressive Direct Insurance Company ("Progressive") limited or terminated his PIP
15 benefits when it unilaterally determined that the insured had reached "maximum medical
16 improvement," a justification that is not authorized by Washington's insurance regulations. See
17 Durant v. State Farm Mut. Auto. Ins. Co., 191 Wn.2d 1 (2018). USAA and Progressive seek
18 dismissal of plaintiffs' CPA claims because the primary insurance benefit they seek, namely
19 payment of medical bills and expenses, is or arises from a "personal injury" not recoverable
20 under the CPA.
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23 RCW 19.86.090 provides a right of action to "[a]ny person who is injured in his or her
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26 ¹ The Court has issued separate orders regarding the other issues raised in defendants' motions.

1 business or property by a violation of” the Consumer Protection Act. “The CPA’s requirement
2 that injury be to business or property excludes personal injury, ‘mental distress, embarrassment,
3 and inconvenience.’” Frias v. Asset Foreclosure Servs., Inc., 181 Wn.2d 412, 431 (2014)
4 (quoting Panag v. Farmers Ins. Co. of Wash., 166 Wn.2d 27, 57 (2009)). Damages arising from
5 personal injury, including medical expenses, pain and suffering, and reimbursement for lost
6 wages, are not injuries to business or property and are therefore not recoverable under the CPA.²

8 It is relatively common for Washington drivers who believe their insurance company
9 failed to make a good faith investigation of their claim or otherwise violated applicable
10 insurance regulations to bring a CPA claim against the insurer. These claims seek payment under
11 the terms of the policies - including payments and reimbursements for medical expenses - and
12 have been permitted to proceed despite the connection to “personal injuries.” See, e.g., Keodalah
13 v. Allstate Ins. Co., 3 Wn. App. 2d 312 (2018) (motorist injured in automobile accident brought
14 a CPA claim against the adjuster who handled his underinsured motorist (“UIM”) claim); Nelson
15 v. Geico Gen. Ins. Co., 192 Wn. App. 1007, 2016 WL 112475 (2016) (pedestrian struck by
16 motor vehicle brought a CPA claim against insurer for failing to disclose all the benefits of the
17 relevant policies); Anderson v. State Farm Mut. Ins. Co., 101 Wn. App. 323 (2000) (remanding
18 for trial a CPA claim regarding improper claims handling and violations of insurance regulations
19 despite the fact that the UIM claim arose from a collision in which plaintiff fractured her leg and
20 suffered other injuries); Van Noy v. State Farm Mut. Auto. Ins Co., 98 Wn. App. 487 (1999)
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24 ² Even some forms of property damage have been deemed not recoverable if the damage arises
25 from an event that also caused personal injuries. See Hiner v. Bridgestone/Firestone, Inc., 91 Wn. App.
26 722, 730 (1998) (precluding recovery for damage to a vehicle where the damage occurred in the same
collision that caused personal injuries).

1 (finding that a CPA claim could proceed where class members asserted that, as a result of State
2 Farm's delay in making coverage determinations, they had incurred medical or therapy expenses
3 that they otherwise would have avoided had the claim been timely denied); Escalante v. Sentry
4 Ins. Co., 49 Wn. App. 375, 387 (1987) (holding that a passenger injured in an auto accident had
5 standing to bring a CPA claim against the insurer for bad faith handling of the claim). The
6 question raised in the above-captioned actions is whether these cases erroneously assumed that a
7 CPA claim against an insurer was viable where the insured was injured in the underlying
8 collision.
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10 The insurers rely heavily on Ambach v. French, 167 Wn.2d 167 (2009). In Ambach, the
11 Washington Supreme Court made clear that artfully pleading "economic" injuries arising from a
12 tortfeasor's negligence - the same negligence that also caused bodily injury - cannot support a
13 CPA claim. Ambach had shoulder surgery in 2002: she suffered a staph infection and had to
14 have a second corrective surgery. Ambach sued the first surgeon, French, for negligence and
15 violation of the CPA. The CPA claim was based on allegations of economic loss related to the
16 excess cost of the initial surgery over alternative, conservative treatments Ambach could have
17 chosen had French not deceived her regarding the benefits of the procedure he was selling. The
18 Supreme Court noted that "[w]here plaintiffs are both physically and economically injured by
19 one act, courts generally refuse to find injury to 'business or property' as used in the consumer
20 protection laws" and held that "because Ambach's purported CPA injury is payment for a
21 surgery from which personal injury also arose, she has failed to state a prima facie CPA claim."
22 Id. at 174 and 179.
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25 The actual holding of Ambach does not bar the CPA claims asserted in the consolidated
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1 actions. Neither Ms. Peoples nor Mr. Stedman are attempting to bring a CPA claim against the
2 persons who caused them bodily injury, as was the case in Ambach. Instead, they are suing a
3 third-party to recover the benefits of insurance contracts they had previously purchased in order
4 to protect themselves from economic losses arising out of automobile collisions. Plaintiffs are
5 not attempting to hold the insurers liable for their collisions. Rather, it is the separate act of bad
6 faith claim handling in violation of Washington's insurance regulations that gives rise to
7 plaintiffs' claims against their insurers.

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9 Ambach, however, contains language suggesting that a demand for insurance coverage to
10 reimburse the insured for medical expenses or to pay medical providers is so connected to the
11 insured's personal injuries, that a CPA claim challenging the way the insurer handled the claim
12 is barred. Id. at 175-76. Federal courts in this district have grabbed hold of that language,
13 precluding CPA claims against insurers for bad faith claim handling if the damages at issue
14 involve unpaid medical bills. Heide v. State Farm Mut. Auto. Ins. Co., 261 F. Supp. 3d 1104,
15 1109-10 (W.D. Wash. 2017) ("Injuries that are derivative of a plaintiff's personal injuries do not
16 constitute an injury to business or property sufficient to sustain an action under the CPA."); Dees
17 v. Allstate Ins. Co., 933 F. Supp 1299, 1310-11 (W.D. Wash. 2013) ("Although [the plaintiff] is
18 correct that money is property, and [the insurance company's] alleged failure to pay her medical
19 bills may have caused her to pay those bills, payment for medical treatment 'does not transform
20 medical expenses into business or property harm.'" (quoting Ambach, 167 Wn.2d at 175));
21 Haley v. Allstate Ins. Co., C07-1494RSM, 2010 WL 4052935, at *7-8 (W.D. Wash. Oct. 13,
22 2010) (dismissing CPA claim based on property damage consisting of the loss of funds
23 necessary to pay uncovered medical bills). There is some indication that the state courts interpret

1 Ambach more narrowly and have not yet embraced a categorical bar against CPA claims brought
2 by an injured insured. See Williams v. Lifestyle Lift Holdings, Inc., 175 Wn. App. 62, 73 (2013)
3 (“The act that caused the alleged personal injury to Williams was the surgery; the acts that
4 caused her alleged consumer injury were the advertising and sales techniques. Williams’
5 Consumer Protection Act claim does not depend on proof that she sustained a personal injury as
6 a result of the surgery. It depends on proof that the surgery was deceptively marketed, like a
7 used car advertised as being new.”); Hayes v. USAA Cas. Ins. Co., 185 Wn. App. 1055, 2015
8 WL 677143, at *5-6 (2015) (noting that then-Judge Mary I. Yu rejected the insurer’s argument
9 that a CPA claim challenging the way the insurer handled PIP claims was a claim for personal
10 injuries and provided plaintiffs an opportunity to show that they had paid providers for charges
11 that were unreimbursed and/or had “out-of-pocket” costs they would not have had the insurer
12 complied with the insurance regulations).

15 Ms. Peoples alleges that, as a result of USAA’s violations of the insurance regulations,
16 she has sustained injury to her property and damages including, but not limited to, reduced
17 insurance benefits, investigative expenses, and out-of-pocket costs. Dkt. # 1-1 at 16-18 in C18-
18 1173RSL. Ms. Peoples seeks an award of “actual damages to be established at trial as provided
19 by the Consumer Protection Act” Dkt. # 1-1 at 20 in C18-1173RSL. Mr. Stedman alleges
20 that Progressive inserted into his policy an additional reason for terminating benefits, one not
21 authorized and expressly precluded by the insurance regulations, and failed to provide the PIP
22 coverage for which he paid. Dkt. # 11 at 11 in C18-1254RSL. He seeks to recover all damages
23 arising from this conduct, including “the amount of any and all medical expenses incurred by
24 claimants following Defendant’s denial of PIP benefits.” Dkt. # 11 at 13-14 in C18-1254RSL. In

1 response to Progressive's motion to dismiss the CPA claim, Mr. Stedman argues that money he
2 has had to pay as a result of Progressive's per se unfair acts is, in other contexts, considered
3 cognizable damage under the CPA. He also asserts that he paid premiums for PIP coverage that
4 was unlawfully curtailed and lost the time it took to participate in the medical examination
5 Progressive required to determine whether he had reached maximum medical improvement.
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8 The Court finds that certification to the Washington Supreme Court to determine how
9 Ambach applies in the insurance context is warranted. Pursuant to RCW 2.60.020, "[w]hen in
10 the opinion of any federal court before whom a proceeding is pending, it is necessary to
11 ascertain the local law of this state in order to dispose of such proceeding and the local law has
12 not been clearly determined, such federal court may certify to the supreme court for answer the
13 question of local law involved and the supreme court shall render its opinion in answer thereto."
14 The certification process serves the important judicial interests of efficiency and comity: as
15 noted by the United States Supreme Court, certification saves "time, energy and resources and
16 helps build a cooperative judicial federalism." Lehman Bros. v. Schein, 416 U.S. 386, 391
17 (1974).
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20 This matter involves dispositive issues regarding whether monetary losses allegedly
21 caused by violations of the Washington insurance regulations are recoverable under the CPA
22 notwithstanding the fact that the insured was physically injured in the underlying automobile
23 collision and sought coverage for costs and expenses related to those injuries. Courts in this
24 district have attempted to predict how the state's highest court would apply Ambach in the
25 insurance context, but the input of the Supreme Court will ensure that this case proceeds to
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1 judgment on a firm legal footing. Comity suggests that this matter should be presented for
2 expedited review pursuant to RCW 2.60.020.

3 For all of the foregoing reasons, the following questions are hereby certified to the
4 Supreme Court of Washington:
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6 With regards to the injury to “business or property” element of a CPA claim, can
7 insureds in Ms. Peoples’ and/or Mr. Stedman’s circumstances, who were
8 physically injured in a motor vehicle collision and whose Personal Injury
9 Protection (“PIP”) benefits were terminated or limited in violation of WAC 284-
10 30-330, bring a CPA claim against the insurer to recover out-of-pocket medical
expenses and/or to compel payments to medical providers?

11 With regards to the “injury to business or property” element of a CPA claim, can
12 insureds in Ms. Peoples’ and/or Mr. Stedman’s circumstances, who were
13 physically injured in a motor vehicle collision and whose Personal Injury
14 Protection (“PIP”) benefits were terminated or limited in violation of WAC 284-
15 30-330, bring a CPA claim against the insurer to recover excess premiums paid for
16 the PIP coverage, the costs of investigating the unfair acts, and/or the time lost
complying with the insurer’s unauthorized demands?

17 The Clerk of Court is directed to submit to the Supreme Court of Washington certified copies of
18 this Order, a copy of the dockets in C18-1173RSL and C18-1254RSL, copies of Dkt. # 1-1, 12,
19 and 31-34 in C18-1173RSL, and copies of Dkt. # 11, and 19-21 in C18-1254RSL. The record so
20 compiled contains all matters in the pending cause deemed material for consideration of the state
21 law questions certified for answer.
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1 The defendant insurers in this consolidated action are designated as the appellants before
2 the Supreme Court of Washington. The Clerk of Court shall notify the parties as soon as
3 possible, but no more than three days, after the above-described record is filed in the Supreme
4 Court of Washington. The parties are referred to state RAP 16.16 for additional information
5 regarding procedure before the Supreme Court.
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8 Dated this 4th day of March, 2019.

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10 Robert S. Lasnik
11 United States District Judge
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